65 FLRA No. 15

UNITED STATES
DEPARTMENT OF THE ARMY
UNITED STATES
ARMY DENTAL ACTIVITY
FORT BRAGG, NORTH CAROLINA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1770
(Union)

0-AR-4361

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DECISION

August 31, 2010

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award (the fee award) of Arbitrator Robert G. Williams filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

In the fee award, the Arbitrator awarded attorney fees. For the reasons that follow, we modify the fee award to provide that the amount of fees must be recalculated based on market rates prevailing at the time when the attorneys rendered their services, but otherwise deny the exceptions.

II. Background and Arbitrator's Awards

A. Merits Awards

In his original award, the Arbitrator sustained, in part, the grievances over the grievants' five-day suspensions. Specifically, although he sustained charges of absence without leave (AWOL) and failing to follow call-in procedures, he rejected charges of falsifying time cards. He mitigated the discipline to written reprimands for being AWOL and for failing to follow call-in procedures, and he awarded the grievants backpay. *U.S. Dep't of the Army, U.S. Army Dental Activity Headquarters, XVIII Airborne Corps & Fort Bragg, Fort Bragg, N.C.*, 62 FLRA 70, 70 (2007) (*Dep't of the Army*). In a supplemental award, the Arbitrator held that the reprimands must conform to the requirements set forth in 5 U.S.C. § 7503,[1] and he awarded attorney fees. *Id.*

The Agency filed exceptions, and the Authority concluded that the Arbitrator had misinterpreted § 7503 in directing the reprimands. Accordingly, the Authority vacated the award and remanded the matter to the parties for resubmission to the Arbitrator for a reassessment of whether the five-day suspensions were proper. *Id.* at 72. The vacating of the award was without prejudice to another petition for fees if the Arbitrator again awarded backpay. *Id.* at 73.

On remand (the remand award), the Arbitrator determined that the Agency failed to prove the falsification charge. Although he again sustained the charges of AWOL and failing to follow call-in procedures, he found that these charges were part of the same incident and were not separate offenses. He also found that the grievants were treated disparately with respect to the charge of failing to follow call-in procedures. On this basis, the Arbitrator again mitigated the five-day suspensions to written reprimands and awarded backpay. Fee Award at 2-3. The Agency did not file exceptions to the remand award, and the Union filed a petition for an award of attorney fees. *Id.* at 3.

1. Section 7503(a)-(b) provides, in pertinent part:

> (a) Under regulations prescribed by the Office of Personnel Management, an employee may be suspended for 14 days or less for such cause as will promote the efficiency of the service . . . .
>
> (b) An employee against whom a suspension for 14 days or less is proposed is entitled to--
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> (1) an advance written notice stating the specific reasons for the proposed action;
>
> (2) a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;
>
> (3) be represented by an attorney or other representative; and
>
> (4) a written decision and the specific reasons therefore at the earliest practicable date.

B. Fee Award

As relevant to the Agency's exceptions, the Arbitrator addressed whether an award of fees was warranted in the interest of justice and whether the requested amount was reasonable within the meaning of 5 U.S.C. § 7701(g)(1) (§ 7701(g)(1)).[2] As to the interest of justice, the Arbitrator applied the criteria established by the Merit Systems Protection Board (MSPB) in *Allen v. United States Postal Service*, 2 M.S.P.R. 420 (1980) (*Allen*) and by the Authority for cases brought under the Statute.[3]

The Arbitrator considered whether criterion 5 of *Allen* was satisfied because the Agency "knew or should have known that it would not prevail on the merits" when it brought the disciplinary actions. *Allen*, 2 M.S.P.R. at 435. In this regard, the Arbitrator reiterated several findings that he had made in his original award with regard to the Agency's certification policy on time and attendance on which the falsification charges were based. Fee Award at 44. Specifically, he stated that: the Agency had a certification policy on time and attendance of only requiring employees to initial their time sheets; under this certification policy, employees were not responsible for time sheet omissions; and the Agency could not prove an intentional falsification charge on the basis of an omission. In addition, in the fee award, he found that the Agency should have known that it could not prove this charge when it brought the disciplinary actions. *Id.* at 44. Consequently, he concluded that fees were warranted in the interest of justice under criterion 5 of *Allen*. *Id.*

Although the Arbitrator recognized that fees are warranted in the interest of justice when any one of the criteria of *Allen* is satisfied, he also concluded that fees were warranted in the interest of justice under *Allen* criterion 2. *Id.* at 42. In addition, he further concluded that fees were warranted in the interest of justice under the Statute because of a service to the public in bringing the grievance. *Id.* at 46-47.

As to the reasonableness of the hourly rates charged by the Union's attorneys, the Union's attorneys provided the Arbitrator with the fee agreement, as well as affidavits and other evidence of prevailing market rates. In addressing the hourly rates, the Arbitrator focused on the fee agreement between the Union and the attorneys. The agreement provided that the attorneys may charge the Union "a reduced fee in the public interest[.]" *Dep't of the Army*, 62 FLRA at 73 (quoting the fee agreement). However, the agreement also provided that the attorneys would charge the Union hourly rates consistent with the "[a]djusted *Laffey* matrix" "upon receipt of a successful decision."[4] *Id.* The Arbitrator rejected the Agency's claim that the reduced rate was the attorneys' customary rate and the rate he was required to apply. Fee Award at 49. The Arbitrator found that his merit awards constituted a "successful decision" within the meaning of the fee agreement and that the agreement to pay rates consistent with the adjusted *Laffey* matrix applied. *Id.*

Next, the Arbitrator rejected the Agency's claim that the *Laffey* matrices could not apply because the attorneys' geographical area of practice is Baltimore,

2. Section 7701(g)(1) provides, in pertinent part, that the Merit Systems Protection Board (the Board or MSPB) "may require payment by the agency involved of reasonable attorney fees incurred by an employee . . . if the employee . . . is the prevailing party and the Board . . . determines that payment by the agency is warranted in the interest of justice[.]"

3. In *Allen*, the MSPB listed five broad categories of cases in which an award of attorney fees would be warranted in the interest of justice: (1) where the agency engaged in a prohibited personnel practices; (2) where the agency action was clearly without merit or wholly unfounded or the employee was substantially innocent of charges brought by the agency; (3) where the agency initiated the action in bad faith; (4) where the agency committed a gross procedural error; and (5) where the agency knew or should have known that the it would not prevail on the merits when it brought the proceeding. *Allen*, 2 M.S.P.R. at 434-35. An award of fees is also warranted in the interest of justice in cases brought under the Statute when there is a service to the federal workforce or a benefit to the public derived from maintaining the action. *U.S. Dep't of the Navy, Commander, Navy Region Haw., Fed. Fire Dep't, Naval Station Pearl Harbor, Honolulu, Haw.*, 64 FLRA 925, 928 (2010).

4. The *Laffey* matrix sets forth a method for determining the appropriate hourly rate for attorneys in the Washington, D.C. area. *AFGE, Local 2608*, 63 FLRA 486, 487 n.2 (2009). As recognized by the Arbitrator and as explained by the court in *Smith v. D.C.*, 466 F. Supp. 2d 151 (D.D.C. 2006), there are two versions of the matrix. One version is maintained by the Civil Division of the Office of the United States Attorney, which calculates the matrix rate for each year by adding the change in the overall cost of living as reflected in the United States consumer price index (CPI) for the Washington, D.C. area for the prior year and rounding that rate to the nearest multiple of $5. 466 F. Supp 2d at 156. That version is commonly referred to as the *Laffey* matrix. By contrast, the so-called "adjusted" *Laffey* matrix calculates the matrix rates for each year by using the legal services component of the CPI rather than the general CPI. *Id.*

Maryland, and the *Laffey* matrices apply only to attorneys practicing in Washington, D.C. *Id.* at 51-52. In this connection, the Arbitrator found that the attorneys' practice was not limited to Baltimore. *Id.* at 52. The Arbitrator also found that the adjusted *Laffey* matrix had the advantage in comparison with the *Laffey* matrix of being based specifically on the price of legal services. *Id.* at 50. In addition, the Arbitrator noted that, in the settlement of another case, the Agency had accepted, as reasonable, rates that were consistent with the adjusted *Laffey* matrix. *Id.* at 53.

For these reasons, the Arbitrator concluded that it was appropriate to apply rates consistent with the adjusted *Laffey* matrix. In calculating the amount of fees, the Arbitrator applied the adjusted *Laffey* rates existing at the time of the award, rather than the time of the performance of the legal services. He did so "because interest is not payable on attorney fees earned in prior periods." *Id.* at 54.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the Arbitrator erred by concluding that an award of fees was warranted in the interest of justice. As to *Allen* criterion 5, the Agency maintains that, when it brought the disciplinary actions, it relied on the uncontested facts that the grievants were absent from duty without approved leave. The Agency also maintains that it relied on the belief that the grievants were not credible and that the Arbitrator confirmed this belief by finding that they were not credible witnesses. Exceptions at 16. The Agency also notes that the Arbitrator found that it did not realize that its certification policy precluded proving the alleged charges. *Id.* In addition, although the Agency concedes that it did not file exceptions to the remand award, *id.* at 5, the Agency disputes the Arbitrator's finding in that award that the Agency could not prove an intentional falsification charge based on an omission, *id.* at 17. The Agency asserts that, contrary to the finding of the Arbitrator, it had a reasonable basis for charging the grievants with falsifying their time cards. *Id.* Further, the Agency argues that the Arbitrator erroneously determined that its actions were clearly without merit under *Allen* criterion 2, *id.* at 10-13, and that there was a benefit to the public in bringing the grievance, *id.* at 17.

Additionally, the Agency contends that, if an award of fees is warranted in the interest of justice, then the award is deficient because the hourly rates are not reasonable. The Agency argues that the fee agreement establishes the reduced fee amount as the maximum fee available under § 7701(g) because that fee constitutes the attorneys' customary billing rate. *Id.* at 19. Alternatively, the Agency argues that the Arbitrator erred by applying the adjusted *Laffey* matrix either because the attorneys practice in Baltimore or because he should have applied the *Laffey* matrix maintained by the Office of the U.S. Attorney, instead. *Id.* at 20-22. In addition, the Agency alleges that the Arbitrator inappropriately relied on the Agency's acceptance of the adjusted *Laffey* matrix in a settlement of another case because that case was a settlement rather than an arbitration award and the circumstances were not comparable. *Id.* at 21-22.

Finally, the Agency asserts that the Arbitrator erred by applying the adjusted *Laffey* matrix rates as they existed on the date of the award, rather than as they existed when the attorneys rendered their services. In this connection, the Agency maintains that the MSPB has held that fees may not be enhanced under § 7701(g) by applying current rates retroactively. *Id.* at 23.

B. Union's Opposition

As to the Agency's contention that an award of fees is not warranted in the interest of justice, the Union argues that *Allen* criterion 5 was satisfied because the evidence showed that the Agency knew or should have known that it would not prevail. Opp'n at 6. The Union also argues that *Allen* criterion 2 was satisfied and that an award of fees was warranted in the interest of justice under the Statute. *Id.* at 5, 7-8.

As to reasonableness of the amount, the Union asserts that the fee agreement did not establish the reduced fee amount as the maximum available under § 7701(g) and that the Arbitrator correctly awarded fees at the adjusted *Laffey* rates. *Id.* at 8, 10-17. In addition, the Union argues that the Arbitrator's determination of the appropriate billing rate is a factual finding to which the Authority must defer. *Id.* at 17. Finally, the Union alleges that awarding attorney fees at current prevailing rates is commonplace under other fee-shifting statutes. *Id.* at 18-19.

IV. Analysis and Conclusions

When an exception involves an award's consistency with law, the Authority reviews *de novo* any questions of law raised by the exception and the

award.[5] *E.g., U.S. Dep't of the Navy, Commander, Navy Region Haw., Fed. Fire Dep't, Naval Station Pearl Harbor, Honolulu, Haw.*, 64 FLRA 925, 928 (2010) (*Dep't of the Navy*). In applying a standard of *de novo* review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *Id.* In addition, the award in this case must be in accordance with the standards established under § 7701(g)(1). *Id.* The Agency contends that the award is not in accordance with these standards because, according to the Agency: (1) the award of fees is not in the interest of justice; and (2) the amount of fees is not reasonable. As such, we address only those requirements. *Id.*

A. Interest of Justice

The Authority resolves whether an award of fees is warranted in the interest of justice in accordance with § 7701(g)(1) by applying the criteria established by the MSPB in *Allen*. As recognized by the Arbitrator, an award of fees is warranted in the interest of justice if any one of the criteria is satisfied. *U.S. Dep't of the Air Force, Davis-Monthan Air Force Base, Tucson, Ariz.*, 64 FLRA 819, 821 (2010).

Under *Allen* criterion 5, an award of fees is warranted in the interest of justice when the agency "knew or should have known that it would not prevail on the merits" when it brought the proceeding. *Allen*, 2 M.S.P.R. at 435. This determination requires evaluation of the nature and weight of the evidence available to the agency at the time of the disputed action. *Soc. Sec. Admin., Balt., Md.*, 63 FLRA 550, 552 (2009). Accordingly, arbitrators must determine the reasonableness of the agency's actions and positions in light of the information available to it at the time of the disputed action. *Id.* The assessment of whether an agency knew or should have known that it would not prevail is primarily factual because it is based on the arbitrator's evaluation of the evidence and the agency's handling of that evidence. *Id.* Consequently, when the arbitrator's factual findings support the arbitrator's legal conclusion, the Authority denies an exception to the application of criterion 5. *Id.*

Here, the Arbitrator set forth specific factual findings in support of his legal conclusion that the Agency should have known that it would not prevail on the merits when it brought the disciplinary actions. Specifically, the Arbitrator found that, under the Agency's certification policy for time and attendance, it could not prove an intentional falsification charge on the basis of an omission from an employee's time sheet and that the Agency should have known this when it brought the disciplinary actions. These factual findings support the Arbitrator's legal conclusion that fees were warranted in the interest of justice because the Agency knew or should have known that it would not prevail when it brought the disciplinary actions. *See id.*

We reject the Agency's contention that these findings do not support the Arbitrator's legal conclusion because "the evidence presented did not show the agency *actually realized and understood* that its certification policy precluded proving the charges alleged." Fee Award at 45 (emphasis added). In this regard, *Allen* criterion 5, as quoted above, encompasses what the Agency "should have known" -- not only what it "knew" -- when it brought the disputed action. *Allen*, 2 M.S.P.R. at 435. Thus, the Agency's reliance on that statement does not demonstrate that the Arbitrator erred in concluding that *Allen* criterion 5 was satisfied. With regard to the Agency's assertion that the Arbitrator erroneously found in the remand award that it could not prove the falsification charges, the Agency concedes that it did not file exceptions to that award. As such, that award is final, and the Agency may not, at this stage, challenge these findings. *See U.S. Dep't of the Navy, Naval Undersea Warfare Ctr., Newport, R.I.*, 57 FLRA 32, 34 (2001). Accordingly, we defer to the Arbitrator's factual findings and deny the Agency's exception regarding whether an award of fees was warranted in the interest of justice.[6]

B. Reasonableness of Rate

The requirement of § 7701(g)(1) that the amount of fees be reasonable has two components: (1) reasonableness of the hourly rate; and (2) reasonableness of the number of hours expended. *See U.S. Dep't of Homeland Sec., Immigration & Customs Enforcement*, 64 FLRA 1003, 1007 (2010)

5. Contrary to the Union's claim, the Arbitrator's determination of hourly rate is a legal conclusion reviewed *de novo*. *See U.S. Dep't of Homeland Sec., Immigration & Customs Enforcement*, 64 FLRA 1003 (2010) (arbitrator's determination of hourly rate reviewed *de novo*).

6. As noted, an award of fees is warranted in the interest of justice if any one of the criteria is satisfied. Thus, we find it unnecessary to resolve the Agency's exceptions regarding the additional criteria on which the Arbitrator relied.

(*ICE*). Here, only the reasonableness of the hourly rate is disputed.

The fee agreement between the Union and the attorneys provides that the attorneys may charge the Union a reduced fee, but that the attorneys would charge hourly rates consistent with the adjusted *Laffey* matrix upon receipt of a successful decision. *Dep't of the Army*, 62 FLRA at 73. In *United States Department of Agriculture, Animal and Plant Health Inspection Service, Plant Protection and Quarantine*, 53 FLRA 1688, 1692 (1998) (*PPQ*), the Authority held that a similar fee agreement permitted the arbitrator to award fees at the law firm's non-retainer, billing rates as long as they were reasonable and consistent with prevailing market rates. Accordingly, on the basis of *PPQ*, we deny the Agency's exception contending that the reduced fee must apply.

In addition, the Authority has specifically identified the *Laffey* matrix as "the Washington, D.C./Baltimore rate" and applied it to an attorney whose "ordinary community of practice is the Washington, D.C./Baltimore area" while "home base[d]" in Baltimore. *AFGE, Local 2608*, 63 FLRA 486, 487-88 (2010). Moreover, the Authority's approach is consistent with the judicial approach to the matrix. *Cobell v. Norton*, 231 F. Supp. 2d 295, 302 (D.D.C. 2002) (describing the matrix as establishing a standard hourly rate for attorneys in "the Baltimore-Washington area"). Accordingly, the fact that the attorneys' office is located in Baltimore provides no basis for finding the application of adjusted *Laffey* matrix rates deficient.

The Arbitrator's application of the adjusted *Laffey* matrix, instead of the *Laffey* matrix, also provides no basis for finding the award deficient. Although the Authority has not addressed whether use of the adjusted *Laffey* matrix, rather than the *Laffey* matrix, is appropriate for an award of attorney fees in accordance with the standards of § 7701(g)(1), the court in *DL v. D.C.*, 256 F.R.D. 239 (D.D.C. 2009), noted that the U.S. Court of Appeals for the D.C. Circuit has not expressed a preference between the *Laffey* matrix and the adjusted *Laffey* matrix and has "suggested that the trial court should have discretion in determining the appropriate rates." 256 F.R.D. at 243 & n.4. In view of this approach by the court that established the matrices, we conclude that the Arbitrator was not precluded from applying the adjusted *Laffey* matrix as a matter of law.

The Agency further fails to demonstrate that the adjusted *Laffey* matrix does not establish reasonable hourly rates consistent with prevailing market rates for the Union's attorneys. In this regard, courts have affirmed the award of attorney fees at adjusted *Laffey* matrix rates as reasonable for attorneys practicing in the Washington, D.C./Baltimore, Maryland area. *Salazar v. D.C.*, 123 F. Supp. 2d 8, 15 (D.D.C. 2000). In addition, the Union's attorneys provided the Arbitrator with case citations demonstrating that they have been awarded attorney fees at adjusted *Laffey* matrix rates. Specifically, the Equal Employment Opportunity Commission awarded the Union's attorneys fees at adjusted *Laffey* matrix rates in *Doe v. SSA*, Case No. 120-2003-00498X (2007). The Union's attorneys also submitted arbitration awards in which arbitrators awarded them fees at adjusted *Laffey* matrix rates and settlement agreements in which other agency employers agreed to pay them fees at adjusted *Laffey* matrix rates. In view of this extensive precedent and evidence, the Agency's dispute with the Arbitrator's reliance on the settlement agreement in which the Agency agreed to pay adjusted *Laffey* matrix rates fails to establish that the award is deficient. *Cf. U.S. Dep't of Def., Educ. Activity, Arlington, Va.*, 57 FLRA 23, 26 (2001) (agency failed to establish that the hourly rate awarded by the arbitrator did not reflect the prevailing billing rate in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation). Accordingly, we deny this exception.

In its final exception, the Agency contends that the Arbitrator's application of adjusted *Laffey* matrix rates as they existed on the date of the award, rather than as they existed when the attorneys rendered their services, is contrary to § 7701(g)(1), as interpreted and applied by the MSPB. When an exception contends that an award is contrary to § 7701(g)(1), the Authority looks to the decisions of the MSPB and follows its practices in resolving the exception. *AFGE, Local 2608*, 63 FLRA at 487. In interpreting and applying § 7701(g)(1), the MSPB has recognized that there is no explicit provision for interest on attorney fees. *Krape v. DOD*, 97 M.S.P.R. 430, 435 (2004). Consequently, the MSPB does not permit the retroactive application of current hourly rates to account for delay in payment of attorney fees. *Id.* The Arbitrator's application of adjusted *Laffey* matrix rates as they existed on the date of the award retroactively to account for no provision for interest is contrary to the MSPB's standards and practices established under § 7701(g)(1). *See id.* The Union does not dispute MSPB's practice, but claims, instead, that such enhancement is commonplace under other fee-shifting statutes. However, the standards of other fee-shifting statutes are not relevant because the Arbitrator's award must be in

accordance with the standards established under § 7701(g)(1), which it is not. On this basis, we modify the award to provide that the amount of fees must be recalculated at the adjusted *Laffey* matrix rates as they existed at the time of performance of the legal services.

V. Decision

The fee award is modified to provide that the amount of fees must be recalculated at the adjusted *Laffey* matrix rates as they existed at the time of performance of the legal services. The remaining exceptions are denied.